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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 875

THE STATE OF KANSAS,
Respondent,

vs.

ROBERT M. WALKER,
Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

The petitioner seeks a writ of certiorari to the Supreme Court of Kansas to review the decision of that court affirming the decision of the District Court of Wilson County, Kansas, denying petitioner's motion for a new trial.

OPINION BELOW

The opinion of the Supreme Court of Kansas is reported in *State* v. *Walker*, 199 Kan. 508, 430 P.2d 246 (1967).

JURISDICTION

The petitioner seeks to have this Court accept jurisdiction under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the Supreme Court of Kansas was correct in refusing to apply retroactively the standards contained in the *Miranda* decision to the instant case.
2. Whether the state district court was correct in admitting into evidence statements made by petitioner subsequent to his arrest.
3. Whether there is a federal question involved in the petitioner's other contentions.

STATUTES INVOLVED

K.S.A. 8-530 provides:

> "(a) It is unlawful and punishable as provided in subdivision (c) of this section for any person who is under the influence of intoxicating liquor to drive any vehicle within this state."

K.S.A. 8-531 provides:

> "(a) Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving."

STATEMENT OF FACTS

On February 14, 1966, the case of *State* v. *Walker*, came on for trial in the District Court of Wilson County, Kansas. The petitioner, a licensed attorney, was charged with three counts of driving a motor vehicle upon a pub-

lic highway: (1) without first obtaining a valid operator's license, as required by K.S.A. 8-235; (2) in a reckless manner as defined by and in violation of K.S.A. 8-531; (3) while under the influence of intoxicating liquor, in violation of K.S.A. 8-530. Thereafter, on March 12, 1966, the petitioner was convicted by a jury on all three counts. The petitioner's motion for a new trial was overruled and on appeal, the Supreme Court of Kansas reversed the judgment of the district court with respect to Count One, and affirmed the petitioner's conviction on the charges contained in Counts Two and Three. *State* v. *Walker*, 199 Kan. 508, 430 P.2d 246 (1967). A motion for rehearing was considered and denied on August 31, 1967. Petitioner is now seeking review of this decision.

The facts giving rise to the arrest and conviction of the petitioner and the court testimony pertinent to the questions presented in the petition for certiorari are adequately stated in both *State* v. *Walker*, supra, and in the petitioner's "Abstract of Appellant."

ARGUMENT

1. The Supreme Court of Kansas Was Correct in Refusing to Apply Retroactively the Standards Contained in the Miranda Decision to the Instant Case.

The petitioner, in relying upon the guidelines set forth in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), contends that the district court erred in allowing the prosecution to present testimony regarding conversations and answers resulting from custodial interrogation without first advising petitioner of his constitutional rights. The petitioner would have this Court apply the guidelines contained in the *Miranda* decision retroactively. In support of his position the petitioner erroneously infers from the language contained in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966),

that *Miranda* would not be applied retroactively when there is no question as to the truth or falsity of the State's evidence, but will be so applied when the truth is a matter at issue.

Johnson v. *New Jersey* expressly states that because retroactive application of *Miranda* would seriously disrupt the administration of our criminal laws, *Miranda* should apply only to those cases in which the trial began after the date of the decision, but not to those cases still on direct appeal after that date. Since the trial in the instant case began February 14, 1966, four months after *Johnson* v. *New Jersey*, supra, was decided, *Miranda* should not be applied retroactively.

2. The State District Court Was Correct in Admitting into Evidence Statements Made by Petitioner Subsequent to His Arrest.

The petitioner claims that because he was not advised of his constitutional right to remain silent and because he was refused an opportunity to consult with an attorney, the trial court erred when it admitted into evidence certain statements made by him subsequent to his arrest, and cites and relies on *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

There nowhere appears in the petitioner's "Abstract of Appellant" any statement made by him to the interrogating officer that he desired an attorney. The most that can be said is that at his trial, he did testify that he told the police officer that he would take any chemical test provided that a physician was present. Even assuming that the petitioner did request an attorney and was refused, it cannot be said that he made any statements that could be construed as being self-incriminating. The petitioner is not a layman as was Escobedo, who was unschooled in the subtleties of the law, but rather he is a law

school graduate and a licensed and practicing attorney in the State of Kansas, and presumably well aware of his constitutional rights. Moreover, in *State* v. *Walker,* supra, the court, at page 250, stated:

> ". . ., the record discloses that the defendant was well aware of his rights as evidenced by his complete and continued refusal to answer any questions asked by the interrogating officer. The only answer he made to any question was to finally give his proper name. That, in itself, is no violation of any constitutional right."

The doctrine, as laid down in *Escobedo,* is not applicable here, as the petitioner is an attorney, well-versed in the science of law and further, the record does not disclose what self-incriminating statements if any, were made.

3. No Federal Question Is Involved in Petitioner's Other Contentions.

The petitioner invokes the jurisdiction of this Court under subsection (3) of 28 U.S.C. §1757, which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

As to his first, second, fifth and sixth contentions, the petitioner neither draws into question the validity of

the Kansas statutes, K.S.A. 8-531 and 8-530, on the ground that they are repugnant to the Constitution or laws of the United States, nor does he claim that the contentions involve a determination of any right, privilege or immunity under federal law infringed by the Kansas state court decree. The petitioner alleges only generally that his rights were violated, but does not state precisely what provisions of the Federal, as distinguished from the state, Constitution are relied upon.

The main thrust of the petitioner's argument goes to the sufficiency and legal admissibility of certain evidence alleged to be detrimental to his rights. In *State* v. *Walker*, supra, at page 249, the Supreme Court of Kansas stated that:

> "In determining whether there was sufficient evidence to sustain the verdict rendered, this court will consider only that evidence supporting or tending to support the findings made (Citations omitted), and will not review or weigh conflicting evidence (Citations omitted). In a criminal appeal, this court examines the evidence only to ascertain whether there is an entire absence of substantial evidence from which the jury might reasonably draw an inference of guilt (Citations omitted), and a verdict of guilty will not be disturbed if supported by substantial competent evidence."

In affirming the district court's judgment with respect to the petitioner's conviction on Counts Two and Three, the Kansas Supreme Court reviewed the evidence disclosed by the record and stated that the evidence was sufficient for the jury to reasonably draw an inference of the petitioner's guilt.

The Seventh Amendment to the United States Constitution provides:

> "fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

An exception to the above is where there is a question on the competency and legal effect of the evidence as bearing upon a question of Federal law, in which case this Court may review the facts. *Graham* v. *Gill*, 223 U.S. 643 (1912).

In the instant case, however, the petitioner does not allege that any facts that would tend to lead one to infer that there was present any violation of a federally guaranteed right.

The petitioner is a skilled legal practitioner, experienced in legal matters. Absent any showing by the petitioner as to what Federal rights guaranteed to him by the Constitution were violated, this Court should not disturb the judgment of the Supreme Court of Kansas, which is based on state law and which has not been shown to clash with the United States Constitution. See *Voeller* v. *Neilston Co.*, 311 U.S. 531 (1940), where the Court stated that those matters within the exclusive province of the state which do not involve Federal violations, are not properly before the Court and will not be considered.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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